No. _______

IN THE

Supreme Court of the United States

ALEXANDER L. BAXTER,

Petitioner,

—v.—

BRAD BRACEY and SPENCER R. HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does binding authority holding that a police officer violates the Fourth Amendment when he uses a police dog to apprehend a suspect who has surrendered by lying down on the ground "clearly establish" that it is likewise unconstitutional to use a police dog on a suspect who has surrendered by sitting on the ground with his hands up?

2. Should the judge-made doctrine of qualified immunity, which cannot be justified by reference to the text of 42 U.S.C. § 1983 or the relevant common law background, and which has been shown not to serve its intended policy goals, be narrowed or abolished?

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INTRODUCTION

Petitioner Alexander Baxter was bitten by a police dog that was unleashed on him while he was sitting with his hands in the air, having surrendered to police. The court of appeals held that qualified immunity defeated Baxter's claim—despite a prior appellate panel's denial of immunity on these facts earlier in the same case, and despite precedent in the same circuit holding that unleashing a dog on a man who had surrendered by lying down was a clearly established constitutional violation. The decision below is an archetypal example of the problems with current qualified immunity doctrine and warrants this Court's review.

Qualified immunity, which shields government officials from suit for constitutional violations unless the right they violate was "clearly established," has rightly been the subject of increasing criticism from judges and scholars. The doctrine is nowhere to be found in the text of the statute that purportedly incorporates it, 42 U.S.C. § 1983, but the Court created the doctrine in 1967 by reference to what it understood to be a common law tradition of immunity. Yet recent study has demonstrated that this understanding was mistaken. In fact, the consistent common law practice at the Founding was to hold officers liable for their constitutional violations, without immunity. Likewise, in 1871, when § 1983 was enacted, no generally-applicable common law defense resembling qualified immunity existed.

In the years since the Court created qualified immunity, it has substantially reconfigured it for

reasons of pure policy, divorced from history and text. So to whatever extent the original qualified immunity doctrine may have resembled a good faith defense historically available for certain common law torts, it no longer does. And empirical studies cast serious doubt on whether qualified immunity fulfills the policy goals for which the Court designed it.

While the doctrine's usefulness in serving its purported goals has become increasingly dubious, the costs of qualified immunity to the legal system are clear. The doctrine stultifies the development of constitutional law and leaves the contours of constitutional rights undefined, by encouraging judges to avoid constitutional questions even when they are sharply presented. Qualified immunity has also evaded consistent application by the courts of appeals because the "clearly established" standard is unadministrable. It has created a hodgepodge jurisprudence that does little to guide judges, law enforcement officers, or the public. And qualified immunity weakens respect for the rule of law by ensuring that many constitutional violations go unredressed.

Here, for example, the court below concluded that precedent holding that the Fourth Amendment prohibited unleashing a dog to attack a suspect who had surrendered by lying on the ground did not clearly establish that it prohibited unleashing a dog to attack a suspect who had surrendered by sitting on the ground with his hands up. That obviously wrong result calls, at a minimum, for this Court to hold that "clearly established law" was defined here at too demanding a level of specificity.

The case also exemplifies broader problems with qualified immunity that warrant reconsideration of the doctrine. Baxter's factually simple and legally straightforward case provides an ideal vehicle for doing so.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Sixth Circuit is reported at 751 Fed. App'x 869 and reproduced in the Appendix at 1a. The district court's unreported decision denying summary judgment is reproduced at 9a. The unreported prior decision of the court of appeals affirming the denial of a motion to dismiss based on qualified immunity is available at 2016 WL 11517046, and the unreported district court decision it affirmed is at 2015 WL 6873667; these opinions are reproduced at 14a and 19a, respectively. The magistrate's report and recommendation recommending denial of the motion to dismiss is reproduced at 23a.

JURISDICTION

The court of appeals entered its judgment on November 8, 2018. Pet. App. 1a. Justice Sotomayor extended the time to file this petition to April 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

STATEMENT

In seeking review of the disposition of a motion for summary judgment, the facts will be recounted in the light most favorable to the non-moving party, Petitioner Alexander Baxter. On January 8, 2014, Respondents Brad Bracey and Spencer Harris, officers of the Metropolitan Nashville Police Department, pursued Baxter in response to a report of a residential burglary during which Baxter, a homeless man, had been trying to steal video games, laptops, or computers from unlocked houses. Pet. App. 2a, 9a.

When he realized the police were pursuing him, Baxter fled from one home into the basement of another. *Id.* at 9a. Respondents followed Baxter into the second home. *Id.* They shouted warnings into the basement that if Baxter did not surrender Harris would release his police dog. *Id.* Baxter stayed where he was and initially did not surrender. *Id.* Harris released the dog, who "found [Baxter], began barking, and ran back and forth across the basement." *Id.* at 10a. The officers then entered the basement, and Harris secured the dog by its collar. *Id.*

"Officer Harris remained in front of [Baxter], ordering him to 'show me your hands,' while Officer Bracey circled around behind. [Baxter] testified that at that moment, he 'was sitting on his butt with his hands up in the air.' After elevating his hands he did not move." *Id.* (alterations and internal citation omitted). Five to ten seconds elapsed, *id.* at 2a, providing the officers further confirmation that Baxter had come to a halt and surrendered.

But instead of arresting Baxter, "[s]uddenly, without warning, Officer Harris released [the dog]" to attack him. *Id.* at 10a. As alleged in his original complaint and corroborated by Baxter's later testimony, *id.* at 12a, the dog bit his armpit, *id.* at 19a, which was exposed because his arms were raised in surrender. Baxter was taken to a hospital for emergency medical treatment. *Id.* at 10a, 25a.

Baxter filed a pro se complaint asserting that Harris' second deployment of the dog and Bracey's failure to intervene violated the Fourth Amendment.

Id. at 3a.[1] Bracey moved to dismiss, arguing that his failure to intervene did not violate Baxter's clearly-established rights. Based on a magistrate's report and recommendation, the district court denied qualified immunity. *Id.* at 22a, 28a.

Bracey appealed, and the court of appeals affirmed. Under circuit law, a failure-to-intervene claim requires a showing of excessive force and that the non-intervening officer knew or should have known about it and had both the opportunity and the means to prevent the excessive force. *Id.* at 16a (citing *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997)). The court held that the facts as pleaded—that Baxter "surrendered" when he "sat on the ground with his arms in the air," *id.* at 16a, that the officers were positioned on either side of him, *id.*, and that Officer Harris restrained the dog by the collar before releasing it to attack Baxter, *id.* at 17a—"could support a finding that the officers were in no danger and that Baxter was neither actively resisting nor attempting to flee." *Id.* at 16a-17a. Accordingly, Baxter stated a claim for excessive force. *Id.* at 17a. In addition, the court held that "[t]he right to be free from the excessive use of force in the context of police canine units was clearly established by 2012." *Id.* at 17a-18a. In *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012), the court had held that an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect who was in a known outdoor location at night and was lying on the

[1] Petitioner later amended his complaint; the only amendment was to remove a John Doe defendant. *Id.* at 21a.

ground with his arms at his side. *Id.* at 787, 789. Based on *Campbell* and on prior circuit law establishing that an officer can be liable for his failure to intervene to prevent a use of excessive force, *see* Pet. App. 18a (citing *Turner*, 119 F.3d at 429), the court of appeals affirmed the denial of qualified immunity to Bracey.

After discovery, both officers sought summary judgment, asserting qualified immunity. The district court denied the motion, finding that Baxter's "testimony entirely corroborates all of the material facts alleged in his verified complaint, which the Sixth Circuit has already found could support a finding of excessive force." *Id.* at 12a.

Respondents' appeal was heard by a different panel than the one that had heard the first appeal. The new panel parted company with the prior panel and reversed the district court, holding that the officers' actions did not violate clearly established law. *Id.* at 1a-2a. Other than the addition of a few details, including that five to ten seconds elapsed between when Officer Harris located Baxter sitting on the floor with his hands in the air and when he released the dog to attack Baxter, *id.* at 2a, the appellate court's recitation of the facts tracked the district court's. *See id.* at 2a-3a.

The second panel recognized similarities between Baxter's case and *Campbell* but concluded that "Baxter's case looks closer to *Robinette* [*v. Barnes*, 854 F.2d 909 (6th Cir. 1988)]," Pet. App. 6a, which held that an officer did not use excessive force when he used a dog to apprehend a suspect who *had not surrendered* and was evading arrest. *See Robinette*, 854 F.2d at 910-11. The *Robinette* court held that, in

these circumstances, the officer was justified in viewing the suspect as a potential threat. *Id.* at 913. *Robinette* expressly distinguished the case of "a criminal suspect who … posed no threat to the officer." *Id.* at 914. Nonetheless, the second appellate panel in *Baxter* reasoned that "[l]ike the suspect in *Robinette*, Baxter fled the police after committing a serious crime and hid in an unfamiliar location. He also ignored multiple warnings that a canine would be released, choosing to remain silent as he hid." Pet. App. 6a.

The second panel acknowledged that the prior panel had reached the opposite conclusion. *Id.* at 7a. The second panel justified changing course with the observation that the prior panel "looked only at the facts as pleaded in the complaint .... The facts revealed during discovery add much-needed color to this case." *Id.* But the second panel did not disagree with the district court's characterization of Baxter's testimony as entirely corroborating the facts pleaded in the complaint—including the fact that the second dog-deployment (the one Baxter challenged) occurred "[s]uddenly, without warning" and after Baxter was sitting on the ground with his hands raised in surrender. *Id.* at 10a. The court of appeals acknowledged that Baxter had his hands up, *id.* at 6a, but nonetheless held that qualified immunity was warranted because "Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances." *Id.* at 7a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG AND DEMONSTRATES THAT QUALIFIED IMMUNITY HAS GENERATED CONFUSION AND REQUIRES RECONSIDERATION.

At the time Baxter was attacked, Sixth Circuit precedent established that an officer cannot constitutionally deploy a police dog against a suspect who has already surrendered and is not in a position to harm anyone or to flee. Nonetheless, the court below held that the dog attack here did not clearly violate Baxter's Fourth Amendment rights because he surrendered by sitting and raising his hands, whereas in the prior case, the suspect had laid down on the ground. This decision is plainly wrong and—particularly in light of the first panel's opposite conclusion on the same facts—epitomizes the dysfunctionality of qualified immunity.

Judges and scholars have recognized that qualified immunity's key requirement—that courts determine when a particular act has violated "clearly established" law—is "a mare's nest of complexity and confusion." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* 62 Fla. L. Rev. 851, 852 (2010). The problem, Judge Willett has explained, is that "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for the law to be "clearly established." *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante); *see also, e.g., Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n. 10 (D.N.M. 2018) (expressing similar concern); *Thompson v. Clark*, 2018 WL 3128975, at

*12 (E.D.N.Y. June 26, 2018) (noting conflict among Supreme Court decisions on this point); *see generally Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established."). Leading scholars of federal jurisdiction have identified the same problem. *See* Richard Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1047-50 (7th ed. 2015) ("Hart & Wechsler"); Erwin Chemerinsky, *Federal Jurisdiction* 595 (7th ed. 2016).

This Court's instructions have not always pointed in the same direction. Courts are "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), because immunity cannot be denied unless "the contours of a right are sufficiently clear that every reasonable official would have understood that *what he is doing* violates that right." *Id.* at 741 (citation, internal quotation marks, and source's alteration marks omitted, and emphasis added). Yet the Court has also rejected the requirement that "the facts of previous cases be materially similar" to those at issue in order to overcome immunity. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation and internal quotation marks omitted). Instead, what is required is that precedent provide the officer "fair warning" that his conduct crosses the constitutional line. *Id.* at 741; *accord Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). As Dean Chemerinsky has explained, "There is an obvious tension between *Hope v. Pelzer*, declaring that there need not be a case on point ... and the subsequent cases, finding qualified

immunity based on the lack of a case on point." Chemerinsky, *supra*, at 595.

Faced with these conflicting imperatives, courts struggle to define rights at the appropriate level of generality—and to do so with consistency. The task of applying qualified immunity in a consistent and principled manner has left the circuits in disarray, divided both among and within themselves.

Here, for instance, two different panels of the Sixth Circuit considered essentially the same facts—first, taking the facts alleged in Baxter's complaint as true for purposes of a motion to dismiss, Pet. App. 16a-17a, and second, drawing inferences in Baxter's favor, *id.* at 4a, on a record with testimony "entirely corroborat[ing]" his allegations, *id.* at 12a. But the two panels arrived at conflicting answers as to whether the unconstitutionality of the dog attack was "clearly established." The second panel decision (at issue here) effectively required a prior case with identical facts in order to defeat immunity. That approach is directly contrary to *Hope*, and reversal is warranted on that ground alone. More broadly, the disagreement between the two panels in Baxter's case is a microcosm of the conflict throughout the courts of appeals regarding the level of factual similarity needed to find the law "clearly established."

A. The Decision Below Is Wrong Because It Required Petitioner To Identify A Case With Identical Facts To Defeat Qualified Immunity.

Any reasonable officers in the shoes of Respondents Harris and Bracey would have known

that unleashing a police dog against Baxter after he surrendered by raising his hands in the air was unconstitutionally excessive force. Two years before Baxter was attacked, the Sixth Circuit held that a clearly established Fourth Amendment violation occurred when an officer released a police dog on a burglary suspect who was not fleeing or resisting arrest and had effectively surrendered by lying on the ground. *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012). Using this Court's rubric from *Graham v. Connor,* 490 U.S. 386, 397 (1989), *Campbell* considered two plaintiffs' claims of excessive force at the hands of the same officer deploying the same police dog. The facts in one of the two incidents at issue in *Campbell* are remarkably similar to the facts in this case. The first Sixth Circuit panel to consider Baxter's case was therefore correct when it concluded that *Campbell* precludes Respondents' qualified immunity defense: it gave Officers Harris and Bracey "fair warning," *Tolan*, 572 U.S. at 656; *Hope*, 536 U.S. at 741, that the Constitution prohibits using a police dog to attack a suspect who has surrendered and poses no threat.

In *Campbell*, police were called to a residence by neighbors who observed Campbell pounding on the front and back doors. 700 F.3d at 784. When Campbell heard sirens, he fled and lay down on the ground near an adjacent building. *Id*. The police arrived and "conclude[d] that they were dealing with an attempted burglary and that the suspect was likely still in the area." *Id.* at 785. The officer handling the dog was not "aware of a specific threat to anyone at the time." *Id.* at 787. "When the officers found Campbell, he was lying face down with his arms at his side. ... At no point was Campbell

actively resisting arrest." *Id.* Yet "without warning," the officer deployed the police dog. *Id.* at 789. Based on these facts, the court affirmed the denial of summary judgment to the officers, holding both that a reasonable jury could find for Campbell on his excessive force claim, *id.* at 787, and that qualified immunity must be denied, *id.* at 789.[2]

Campbell is no outlier. Rather, it reflects a faithful synthesis of basic Fourth Amendment principles that are well-established in the Sixth Circuit (and should in any event be obvious). First, "the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law.'" *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) (holding that this principle was clearly established by 2010, and collecting authorities); *accord Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006) ("Because Baker had surrendered before being struck, a reasonable jury could conclude that Officer Taylor's strike to Baker's head was unjustified and excessive.").

Second, initial flight from the police does not justify a later use of force after a suspect is no longer fleeing or resisting arrest. *See Martin v. City of Broadview Heights*, 712 F.3d 951, 959 (6th Cir. 2013)

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[2] The court also held that Campbell could proceed to trial on a second theory: that deploying the dog was unreasonable because the dog had been improperly trained. *See id.* at 787. That *Campbell* addressed more than one issue does not lessen the force of its on-point holding here. *See Hope*, 536 U.S. at 742 ("The fact that *Gates* found several forms of punishment impermissible does not … lessen the force of its holding with respect to handcuffing inmates to cells or fences for long periods of time.").

(observing that the "mere fact that [plaintiff] tried to escape from [officer's] control does not justify the latter's conduct as a matter of law," and citing the 2006 *Baker* decision, 471 F.3d at 607-08, "finding that a suspect's attempt to evade arrest by running two blocks from an officer did not preclude his claim of excessive force or justify the officer's subsequent baton strikes").

As the Sixth Circuit panel that first heard this case concluded, *Campbell* plainly defeats qualified immunity here. When Officer Harris released the dog to attack Baxter, he and Officer Bracey were positioned on either side of Baxter inside a basement, and Baxter was sitting with his hands up, unarmed. Thus Baxter, like Campbell, posed no threat and was not actively resisting arrest when Officer Harris released the dog to attack him. Campbell was lying on the ground with his arms at his sides; Baxter was sitting on the ground with his hands outstretched above him.

Notwithstanding the similarities between this case and *Campbell*, and in the face of the first Sixth Circuit panel decision, the second Sixth Circuit panel held that no prior case clearly established that it was unreasonable for Officer Harris to sic his dog on Baxter. The second panel likened Baxter's case to *Robinette v. Barnes*, 854 F.2d 909, 913-14 (6th Cir. 1988), which "upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location," Pet. App. 6a—even though Baxter was, of course, no longer "fleeing" when Officer Harris released his dog the second time. *Robinette* explained that a reasonable officer would believe that a suspect "who had been warned … that

a dog would be used, and who gave every indication of unwillingness to surrender, posed a threat to the safety of the officers." *Id.* at 913-14. Baxter, however, does not fit this description, having raised his hands in an obvious indication of surrender.

The second panel justified breaking with the first panel by pointing to facts developed in discovery, but the most important "fact" the panel cited—that "Baxter ... was warned twice, and still never communicated with the officers before being apprehended," Pet. App. 7a-8a—is not a fact at all but an inexplicable mischaracterization of Baxter's putting his hands up, which not only is a universal signal for surrender but also has been specifically recognized as the "surrender position" by prior Sixth Circuit precedent. *See Ciminillo v. Streicher*, 434 F.3d 461, 463, 467 (6th Cir. 2006) (reversing summary judgment on qualified immunity grounds, because when the plaintiff "slowly walked towards the officers with his hands above his head," his use of the "surrender position" "demonstrated that he was not armed, and thus posed no threat to the officers' safety"); *accord Baker*, 471 F.3d at 607 (describing suspect who emerged from bushes with his hands up as having "surrendered" such that a reasonable jury could find "that he was unarmed, was compliant, and was not a significant threat"). The significance of Baxter's gesture was clear even to the second panel, which grudgingly acknowledged that Baxter's "raising his hands in the air before Harris released the dog … might show that he did not pose the kind

of safety threat justifying a forceful arrest." Pet. App. 6a (citing *Ciminillo*, 434 F.3d at 467).[3]

The panel's choice to look to *Robinette* instead of *Campbell* demonstrates how unpredictable and arbitrary the application of qualified immunity doctrine has become. The panel's own statement of its reason for distinguishing *Campbell* is telling: "Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances." *Id.* at 7a. Campbell was non-threatening because he lay on the ground; Baxter, because he sat down with his hands up. In both cases, the relevant fact is that it was clear that the suspect posed no threat; if anything, Baxter should have been seen as *less* threatening because officers were on both sides of him and because of his decision to assume what the Sixth Circuit has recognized as the "surrender position." *Ciminillo*, 434 F.3d at 467. Differentiating between these two cases because of the suspect's precise posture epitomizes the "rigid[] overreliance on factual similarity" that this Court has rejected, *Hope*, 536 U.S. at 742; *accord Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (stating that the Court's doctrine

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[3] The other newly "revealed" facts the second panel cited occurred before Baxter's surrender ("Baxter fled the scene, hid in the basement, was warned twice," *id.* at 7a), or were not the basis for Baxter's claim ("[the dog] was well-trained," *id.*), or do not undermine Baxter's claim (the fact that Harris released the dog occurred "within only a few seconds after entering the basement," *id.* where Baxter had already "surrendered by raising his hands in the air before Harris released the dog," *id.* at 6a).

"does not require a case directly on point for a right to be clearly established" (citation and internal quotation marks omitted)).

If *Campbell* and the broader body of Sixth Circuit jurisprudence regarding the implications of a suspect's surrender do not clearly establish that the facts in this case could support a jury's finding of excessive force, then nothing short of a prior case with precisely identical facts will suffice to defeat qualified immunity. The decision below wrongly immunizes officers for attacking a defenseless man who has clearly indicated his surrender and posed no threat. And it did so based on a doctrine that has defied consistent and principled application.

B. Qualified Immunity Decisions Among And Within The Courts Of Appeals Are Rife With Inconsistency.

The conflict between the first and second panels in Baxter's case is not isolated. Rather, the circuits are divided among and within themselves about how to approach the "clearly established" question. *See* Jeffries, *supra*, at 852 ("The circuits vary widely in approach[.]"). The decision below conflicts with the decisions of several other circuits rejecting its hair-splitting approach. *See, e.g.*, *Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018) (denying qualified immunity although "no other court decisions directly have addressed circumstances like those presented here"); *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017) (declining to require "a case presenting a nearly identical alignment of facts" to deny qualified immunity (citation and internal quotation marks omitted)); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) (denying qualified immunity to

officer who used a Taser on "nonviolent, nonfleeing misdemeanant" even though "we had not yet had an opportunity" to address a case involving such facts); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004) (no qualified immunity for school officials who punished a student for silently raising a fist during daily flag salute; court refused to "distinguish, on constitutional grounds, between a student with his hands in his pockets or at his sides … and a student with his hand in the air").

Conflict concerning the "clearly established" inquiry has led to conflicts in its application. For instance, the Second and Seventh Circuits have held that the constitutional limits on the use of new weaponry can be "clearly established" even if courts have not previously considered those specific weapons. *See Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018) (denying qualified immunity to officers who employed long-range acoustic device despite absence of cases about that specific weapon because "novel technology, without more, does not entitle an officer to qualified immunity"); *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (denying immunity for excessive force claim for using a device akin to a bean-bag shotgun, even though no prior case held the use of that weapon unconstitutional). But in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), the Ninth Circuit took the opposite approach, granting immunity to an officer who deployed a Taser on a non-threatening victim of a domestic dispute, because "there was no Supreme Court decision or decision of our court addressing the use of a Taser in dart mode." *Id.* at 452 (internal quotation marks omitted).

Indeed, the "clearly established" standard is so murky that it has engendered many conflicts *within* the circuits. The rift between the first and second panels here is one example of such a conflict, but it is not alone, even within the Sixth Circuit.

For example, in *Baynes v. Cleland*, 799 F.3d 600 (6th Cir. 2015), the Sixth Circuit considered whether a district court had erred in granting qualified immunity to an officer sued for handcuffing a suspect too tightly, where no case addressed the specific circumstances presented—the plaintiff complained only once, and the police-car ride during which he was handcuffed was only 20 minutes long. *See id.* at 615. The court of appeals reversed the grant of immunity because circuit precedent holding that "excessively forceful or unduly tight handcuffing is a constitutional violation" established the law at the requisite level of specificity. *Id.* at 614. "Requiring any more particularity than this," the court explained, "would contravene the Supreme Court's explicit rulings that neither a 'materially similar,' 'fundamentally similar,' or 'case directly on point'—let alone a factually identical case—is required." *Id.* (citing *Hope*, among other cases).

But in *Latits v. Philips*, 878 F.3d 541 (6th Cir. 2017), the same court required just such particularity in prior precedent. There, officers chased a motorist and momentarily subdued him; when the motorist then attempted to drive off, one of the officers, standing at the side of the car, shot him. *Id.* at 546. The driver, according to the court, "did not present an imminent or ongoing danger." *Id.* at 552. Notwithstanding circuit precedent that "had clearly established that shooting a driver while positioned to

the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat," the court granted qualified immunity. *Id.* at 553 (citation and internal quotation marks omitted). It explained that prior circuit cases establishing the law had involved drivers who "attempted to *initiate* flight" whereas in *Latits*, the officer pulled the trigger as the driver attempted to *re-initiate* flight after he had already been stopped. *Id.* Thus, as in the decision below, *Latits* granted qualified immunity based on minute factual distinctions of the type the Sixth Circuit disavowed in *Baynes* and this Court abjured in *Hope*.

Qualified immunity jurisprudence is equally muddled in other circuits. Just two years after the Ninth Circuit granted immunity to the Taser-firing officer in *Mattos*, a panel from that circuit endorsed the opposite approach to excessive force claims involving new technologies. *See Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) ("[I]t does not matter that no case of this court directly addresses the use of [a particular weapon]; we have held that [a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." (citation and internal quotation marks omitted) (second and third alteration in original)). The Tenth Circuit's qualified immunity jurisprudence is similarly fractured. *Compare Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) ("[W]e need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as Officer Sweet allegedly did" when he tackled and

used a Taser on a "nonviolent misdemeanant[].”), *and Morris v. Noe*, 672 F.3d 1185, 1197-98 (10th Cir. 2012) (denying qualified immunity even though court "found no cases addressing the type of force used here”), *with Lowe v. Raemisch*, 864 F.3d 1205, 1209-10 & n.9 (10th Cir. 2017), *cert. denied sub nom. Apodaca v. Raemisch*, 139 S. Ct. 5 (2018) (granting qualified immunity for prisoner's 25-month deprivation of outdoor exercise, despite circuit precedent holding that a 36-month deprivation of outdoor exercise stated an Eighth Amendment claim, because prior case focused on whether 36-month deprivation could imply deliberate indifference to Eighth Amendment rights rather than whether such a deprivation was "sufficiently serious" to constitute an Eighth Amendment violation).

Unlike a typical intra-circuit conflict that might be resolved through en banc rehearings, these conflicts involve an inquiry that has defied consistent application across and within circuits and over time, so the difficulties are likely to persist. For instance, the Ninth Circuit's *Mattos* decision recognizing broad immunity for cases involving new police weaponry was contradicted in that circuit's *Gravelet-Blondin* decision just two years later, even though *Mattos* was decided en banc.

In sum, the disarray among the courts of appeals regarding the factual similarity required to establish the law "leaves the 'clearly established' standard neither clear nor established among our Nation's lower courts." *Zadeh*, 902 F.3d at 498 (Willett, J., concurring dubitante).

II. QUALIFIED IMMUNITY IS AN ATEXTUAL AHISTORICAL, CONCEDEDLY JUDGE-MADE DOCTRINE THAT DOES NOT SERVE ITS PURPORTED POLICY OBJECTIVES AND IMPAIRS THE ENFORCEMENT OF CONSTITUTIONAL NORMS.

The problems with qualified immunity exemplified by this case transcend both the dog attack at issue here and the inconsistencies among and within the circuits regarding the definition of "clearly established" law.

A. Since this Court created qualified immunity as a defense against civil rights actions under 42 U.S.C. § 1983, *see Pierson v. Ray*, 386 U.S. 547, 556-57 (1967), it has regularly provided course corrections. The Court modified the doctrine several times in its early years. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (defining test as variable based on the responsibilities of the particular officer alleged to have violated the law); *Wood v. Strickland*, 420 U.S. 308, 318 (1975) (extending doctrine to non-law enforcement personnel). The Court then overhauled the doctrine entirely in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), eliminating the "subjective" prong of qualified immunity and reducing the test to whether a defendant's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. In a series of cases in the late 1990s and early 2000s, the Court imposed a sequencing requirement on the process of adjudicating qualified immunity, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), but then abandoned the

sequencing requirement in response to judicial and scholarly criticism. *Pearson v. Callahan*, 555 U.S. 223, 234-35, 237-42 (2009).

In announcing these various changes, the Court has been "forthright in revising the immunity defense for policy reasons." *Crawford-El v. Britton*, 523 U.S. 574, 594 n.15 (1998); *see also Anderson v. Creighton*, 483 U.S. 635, 645 (1987) ("[T]he Court [in *Harlow*] completely reformulated qualified immunity along principles not at all embodied in the common law."); *Wood*, 420 U.S. at 318 (extending qualified immunity to cover school officials based in part on "strong public-policy reasons").

None of these developments, including the initial creation of qualified immunity, can be traced to the text of § 1983, which "admits of no immunities." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). That fact, on its own, casts doubt on qualified immunity, for "it is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have" wanted. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

B. The Court's original justification for departing from the text of § 1983 was a set of assumptions about its common law background. The Court viewed § 1983 as incorporating immunities that "were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554-55).

But recent historical analysis shows that qualified immunity is divorced from history as well as text; the common law did not recognize the sweeping immunity that the Court began applying in 1967. As Professor William Baude has demonstrated, "lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic," and the "'strict rule of personal official liability, even though its harshness to officials was quite clear,' was a fixture of the founding era." William Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45, 55-56 (2018) (quoting David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972)); *accord* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-64 (2010); *see generally* Hart & Wechsler, *supra*, at 1041 (noting that the current qualified immunity standard is "broader than that recognized at common law").

For instance, in *Little v. Barreme*, 6 U.S. 170 (1804), the Supreme Court affirmed a judgment for damages against a U.S. Navy captain for the unlawful seizure of a vessel even though he acted pursuant to a Presidential directive. As Chief Justice Marshall explained, "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179. Likewise, in *Murray v. The Charming Betsy*, 6 U.S. 64 (1804), another captain who wrongfully confiscated a vessel had apparently acted "upon correct motives, from a sense of duty," *id.* at 123-24, but the Court (again per Chief

Justice Marshall) nonetheless affirmed the district court's judgment against the captain for the wrongful seizure, *id.* at 125.[4] Thus, as Professor Baude summarizes, "good-faith reliance did not create a defense to liability—what mattered was legality." Baude, *supra*, at 56; *accord* Engdahl, *supra*, at 18 (noting that the public official "was required to judge at his peril whether his contemplated act was actually authorized ... [and] judge at his peril whether ... the state's authorization-in-fact ... was constitutional.").

The Founding-era approach to official liability persisted in the years leading up to the enactment of § 1983 in 1871. For instance, in *Mitchell v. Harmony*, 54 U.S. 115 (1851), the Court upheld an award of more than $90,000 against a U.S. Army colonel for seizing the property of a merchant in Mexico during the Mexican-American War. *See id.* at 116, 118, 137. The Court explained that, even assuming the defendant's "honest judgment" that an emergency justified the seizure, the question whether in fact such an emergency existed was for the jury, and its negative answer was sufficient to hold the officer liable. *See id.* at 133-35, 137. Two treatises published in the late 1850s likewise reflect the absence of official immunity. *See* J. Story, *Commentaries on the Law of Agency* § 320 (5th ed. 1857) ("[Public officials] incur the same personal responsibility, and to the same extent, as private agents."); J. Story, *Commentaries on the Constitution* § 1676 (3d ed. 1858) ("If the oppression be in the exercise of

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[4] The Court did reverse as to the precise calculation of damages, which required reassessment on remand. *See id.* at 125-26.

unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.").

In the early years after enactment of § 1983, the Court continued to adhere to the Founding-era view. For instance, in *Beckwith v. Bean*, 98 U.S. 266 (1878), the Court ordered a new trial of officials who had been found liable for assault, battery, and false imprisonment of the plaintiff, whom the officials believed was aiding deserters during the Civil War. *Id.* at 267-68, 285. The ground for reversal was the lower court's failure to admit evidence of the defendants' good faith, *id.* at 275, 285, but the Court explained that such evidence was admissible only regarding whether punitive damages should be awarded, as "compensation cannot be diminished by reason of good motives upon the part of the wrong-doer," *id.* at 276. The Court elaborated: "A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act[.]" *Id.* at 277 (citation omitted). In *Poindexter v. Greenhow*, 114 U.S. 270 (1885), the Court reversed a judgment in favor of a city official who took the plaintiff's personal property. *See id.* at 273-74, 306. The Court reiterated (there in the context of a dispute over sovereign immunity) that a plaintiff whose rights are violated must have a remedy against the official wrongdoer notwithstanding his governmental affiliation: "[H]ow else can ... principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of

wrong, whenever they interpose the shield of the state?" *Id.* at 291. Writing for the Massachusetts Supreme Judicial Court just a few years later, Justice Holmes held members of a town health board liable for mistakenly killing a horse they thought diseased, even though they were ordered to do so by a government commissioner. *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891).

The repeated recognition of officers' amenability to suit guided the Court in interpreting § 1983 itself in *Myers v. Anderson*, 238 U.S. 368, 378, 383 (1915), which upheld the liability of Maryland officials under § 1983 for enforcing a state statute that denied African-Americans the right to vote in violation of the Fifteenth Amendment. Before the Court, "the state officials argued, among other things, that they could not be liable for money damages if they had in good faith thought the statute constitutional" and that § 1983 preserved a "traditional" malice requirement. Baude, *supra*, at 57 (quoting defendants' briefs). The Court summarily rejected the defendants' arguments for "nonliability … of the election officers for their official conduct," 238 U.S. at 378-79—i.e., for official immunity.

Although the Court did not discuss its reasoning on this point, the circuit court whose order it affirmed did so. *Anderson v. Myers*, 182 F. 223 (C.C.D. Md. 1910). Considering whether the plaintiffs needed to plead "that the defendants acted willfully, maliciously, fraudulently, or corruptly" in order to recover under § 1983 (referred to in the opinion by its prior citation, Revised Statutes § 1979), *id.* at 229, the lower court applied the same

approach to official liability that had prevailed since *Little* and *Charming Betsy*:

> [W]hen it says (section 1979) that 'every person who, under color of any statute of any state, subjects or causes to be subjected any citizen of the United States to deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,' what can it mean but that the enforcement of the state law is of itself the wrong which gives rise to the cause of action? …
>
> [A]ny one who does enforce [a state law later ruled unconstitutional] does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Id. at 230. It was not until nearly a century after the enactment of § 1983 that the Court in *Pierson* created the defense of "good faith and probable cause"—the forerunner of qualified immunity.

Moreover, there was no "freestanding" good faith defense available at common law for tort claims generally. *See* Baude, *supra*, at 58-60. Certain early common law torts did allow a good faith defense, but pursuant to the law of that specific tort only. *Id.* Accordingly, there was no justification for reading a general good-faith immunity into § 1983, which includes claims for types of violations (such as

discrimination or abridgment of freedom of speech) for which there were no common law analogues. And those good-faith defenses that existed for the handful of common law torts that are somewhat analogous to certain § 1983 claims bear little resemblance to modern qualified immunity doctrine, which has been stripped of the requirement that the officer act in "good faith." *Harlow*, 457 U.S. at 817-18. Thus, modern qualified immunity doctrine simply *did not exist at all before the Court created it*.

C. As a matter of policy, qualified immunity fails to perform its putative functions. The primary justifications for qualified immunity are to prevent chilling officers' performance of their duties by freeing them from the fear of personal liability for reasonable mistakes, and to guard against the unfairness of requiring officers to pay damages just because they failed to predict the future course of constitutional law. *See, e.g., al-Kidd*, 563 U.S. at 746-47; *Harlow*, 457 U.S. at 814; *Scheuer*, 416 U.S. at 240; *Pierson*, 386 U.S. at 555. But recent empirical research shows that qualified immunity is wholly unnecessary to achieve these objectives.

Officers are virtually never at risk of monetary liability—and they know they are not—because of the near-universal practice of indemnification by the governments that employ them. A recent study of eighty-one geographically diverse law enforcement agencies of various sizes nationwide (including twelve of the twenty largest departments nationwide) found that officers contributed to payments in less than one-half of one percent of civil rights damages actions resolved in plaintiffs' favor. *See* Joanna C. Schwartz, *Police Indemnification*, 89

N.Y.U. L. Rev. 885, 889-90 (2014). Further, "[o]fficers did not contribute to settlements and judgments even when indemnification was prohibited by statute or policy. And officers were indemnified even when they were disciplined, terminated, or prosecuted for their misconduct." *Id.* at 937.[5]

Modern indemnification practice contradicts the Court's explicit assumptions about the prevalence of indemnification. Over three decades ago in *Anderson v. Creighton*, the plaintiffs argued that government indemnification practices counseled against the expansion of qualified immunity; the Court rejected that proposition because plaintiffs "could not reasonably contend that [indemnification programs] make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases." 483 U.S. at 641 n.3. The Court did not opine on the plaintiffs' logic, only the empirical claim underlying it. And the Court has subsequently recognized that "employee indemnification ... reduces the employment-discouraging fear of unwarranted liability." *Richardson v. McKnight*, 521 U.S. 399, 411 (1997). Thus, the recognition that indemnification is practically certain undermines the assumption that qualified immunity is needed to shield officers from liability.

[5] Schwartz identifies a mechanism through which indemnification occurs even when legally prohibited: "Jurisdictions may sidestep prohibitions against indemnification of punitive damages by vacating the punitive damages verdict as part of a post-trial settlement." *Id.* at 921.

D. The costs of qualified immunity to the rule of law are real and significant. Because qualified immunity relies centrally on the question of when the unlawfulness of particular conduct has been "clearly established"—an inquiry for which a consistent standard has eluded federal courts for a generation—the jurisprudence of qualified immunity is beset with inconsistency. *See supra* Part I.B. Because courts are allowed to resolve the qualified immunity inquiry without saying what the law is, "the qualified immunity situation threatens to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). Because courts have discretion to choose whether to resolve the constitutional merits question, the process introduces an opportunity for strategic decisionmaking—and recent scholarship suggests such strategic decisionmaking in fact is occurring. *See* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 Emory L.J. 55, 63 (2016) (finding meaningful differences in applications of the doctrine by appellate panels composed entirely of judges appointed by a Republican President versus panels entirely appointed by a Democratic President). And because qualified immunity, by design, defeats claims even where the Constitution has been violated, it widens the gulf between rights and remedies and thereby erodes the force of constitutional rights themselves:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no

> remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. 137, 163 (1803).

It is no wonder, then, that several Members of this Court have expressed concern about the doctrine in recent Terms. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting) (arguing that the Court's qualified immunity jurisprudence "sends an alarming signal to law enforcement officers and the public" that officers "can shoot first and think later" and that "palpably unreasonable conduct will go unpunished"); *see also id.* (describing the Court's approach to qualified immunity as "one-sided" and warning that such an approach "gut[s] the deterrent effect of the Fourth Amendment").

E. Merits briefing is needed to explore fully the alternatives to the current qualified immunity regime; it is enough to note here that several could be viable. The simplest approach, and the one most faithful to the text and historical context of § 1983, would be to abolish the defense and return the statute to its plain meaning. Because of the near-universal practice of indemnification, this outcome would not implicate the principal concern animating the creation of the doctrine in the first place—eliminating the supposed inhibiting effect on good-

faith official action created by fear of personal liability.

Should the Court decline that option, there are any number of approaches it might adopt that would bring the doctrine closer to its historical roots and mitigate the considerable costs that the current doctrine imposes. Scholars, for example, have proposed numerous modifications. *See, e.g.,* John F. Preis, *Qualified Immunity and Fault*, 93 Notre Dame L. Rev. 1969, 1986 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1833-34 (2018); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 258-64 (2013).

At a minimum, the Court should grant review to make clear that the court of appeals here applied an overly stringent approach to determining whether the law was "clearly established," and the Court should take the opportunity to provide much-needed guidance to lower courts in their application of this standard. As this case and those discussed above illustrate, the standard has sown confusion and conflict within and across circuits and would benefit from further elaboration. In particular, the Court should reaffirm that a case with identical facts is not necessary to establish that conduct is clearly unconstitutional.[6]

"Where a decision has been questioned by Members of the Court in later decisions and has defied consistent application by the lower courts,

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[6] Indeed, the decision below is so evidently wrong that a per curiam reversal would be warranted.

these factors weigh in favor of reconsideration." *Pearson*, 555 U.S. at 235 (citation, internal quotation marks, and source's alteration marks omitted). Qualified immunity as currently configured is unmoored from its foundations, unjustified by its goals, and unworkable in practice. It has generated confusion, conflict, and inconsistency in the lower courts. As Justice Thomas has advised, "In an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872 (opinion concurring in part and concurring in the judgment). This is such a case.

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RECONSIDERING QUALIFIED IMMUNITY.

Several aspects of Baxter's case make it a particularly appropriate one in which to address critical questions about the scope and propriety of qualified immunity.

First, no procedural obstacles or ancillary questions would obstruct this Court's direct consideration of the questions presented.

Second, the facts are simple. Officers pursued a suspect; he initially ran but then surrendered by sitting down with his hands up; one of the officers nonetheless decided to sic a police dog on him, causing physical injuries requiring emergency hospital treatment. Baxter's situation thus lacks the complexity of cases with intricate background facts that informed officers' judgment about how or whether to seize a suspect. *Cf. Brosseau v. Haugen*, 543 U.S. 194, 195-96 (2004) (per curiam) (recounting much more complicated facts); *Hunter v. Bryant*, 502

U.S. 224, 224-26 (1991) (per curiam) (same). Accordingly, reaching the underlying doctrinal question here should be straightforward.

Third (and related), the summary judgment posture ensures that the factual backdrop for considering the qualified immunity question is not abstract. Instead, the Court has before it a developed record in which the the Court's resolution of the qualified immunity issue will directly drive the outcome of the litigation. The qualified immunity issue is squarely presented and has been considered twice by the court of appeals, so there is no risk that this Court will be called upon to provide a "first view" as opposed to a "final review." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Finally, and perhaps most important, the case exemplifies the many problems with the qualified immunity doctrine in practice, including the difficulty of consistent application (even in a single case), the difficulty of identifying the appropriate level of generality at which to define the right at issue, the absence of clear guidance for future conduct, and absurd results. Baxter's case thus enables the Court to evaluate the operation of qualified immunity in a context in which its flaws make a difference—putting the Court in the best position to determine whether these infirmities are justified by the policy concerns that have animated the doctrine and driven its development for half a century.

CONCLUSION

The petition should be granted.

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* Admitted to practice in New York but not in the District of Columbia. Practicing under supervision while application to the D.C. Bar under consideration. D.C. Ct. App. R. 49(c)(8).